STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal From The Court Of Appeals
(Bandstra, P.J., Sawyer and Fitzgerald, J.J.)

DR. LOWELL FISHER, an Individual,

Plaintiff-Appellant,

V

W.A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellee. /

Supreme Court
No. 126333

Court of Appeals
No: 244678

Jackson County Circuit Court
No: 97-79018-CZ

BRIEF ON APPEAL
FOR DEFENDANT-APPELLEE W.A. FOOTE MEMORIAL HOSPITAL

ORAL ARGUMENT REQUESTED

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STATUTES, COURT RULES AND OTHER AUTHORITIES

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THE PUBLIC HEALTH CODE PROVISION PROHIBITING DISCRIMINATION ON THE BASIS OF LICENSURE, REGISTRATION OR EDUCATION AS A DOCTOR OF OSTEOPATHIC MEDICINE, MCL 333.21513(E), CREATES A RIGHT TO JUDICIAL REVIEW OF, OR TORT RECOVERY FOR A VIOLATION OF THE STATUTE?

Plaintiff asserts the answer is "Yes."

Defendant W.A. Foote submits the answer is "No."

The trial court held the answer is "No."

The Court of Appeals held the answer is "No."

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COUNTER-STATEMENT REGARDING JURISDICTION

Defendant W.A. Foote Memorial Hospital, Inc., does not disagree with plaintiff's statement regarding jurisdiction.

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COUNTER-STATEMENT OF FACTS

This Court by order of January 13, 2005, granted plaintiff Lowell R. Fisher, D.O.'s application for leave to appeal "limited to the issue whether MCL 333.21513(e) creates a private cause of action" (Appx 18a). Leave has been granted from the May 4, 2004, per curiam opinion of the Court of Appeals (Bandstra, P.J., Sawyer, and Fitzgerald, JJ.) affirming an order granting summary disposition by Jackson County Circuit Court Judge Alexander Perlos (Appx 15a-16a). Judge Perlos dismissed plaintiff's complaint on a variety of independent and alternative grounds (Appx 10a-12a). The Court of Appeals affirmed the dismissal on the single ground that the Public Health Code provision prohibiting discrimination on the basis of licensure, registration or education as a doctor of osteopathic medicine, MCL 333.21513(e), does not create a right to judicial review of, or tort recovery for a violation of the statute.

Underlying Background Facts

Plaintiff Lowell Fisher, D.O., commenced this action in Jackson County Circuit Court on September 3, 1997. Plaintiff alleged that he improperly was denied medical staff privileges at W.A. Foote Memorial Hospital as a result of "unlawful discrimination against him based upon his status as an osteopathic (as opposed to allopathic) surgeon, contrary to MCL 333.21513(e)" (Complaint, ¶ 13, appx 34a). MCL 333.21513(e) provides, in pertinent part, that a hospital:

> (e) ... shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

It is the hospital's position that plaintiff's request for privileges was denied for the reason that his training and subsequent experience did not meet the requisite criteria for

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receipt of privileges. The denial of privileges was not based upon the fact that Dr. Fisher is a doctor of osteopathic medicine (hereinafter "DO"); to the contrary, physicians with privileges at Foote Hospital include numerous DOs (Affidavit of Harish Rawal, M.D., appx 18b and Affidavit of Kenneth Empey, appx 23b)[1] Although not directly at issue in this appeal in its present posture before the Court, the following facts were established by the record below, and serve as background to the legal issue before the Court.

Medical staff clinical privileges, sometimes called "staff privileges" or simply "privileges," represent formalized permission given by a hospital to a physician to treat specific types of conditions or perform specific types of services or procedures within the hospital based on the physician's experience, training and performance criteria. The credentialing process is statutorily mandated of hospitals, and is conducted in order to reduce morbidity and mortality, and to improve the quality of care rendered in hospitals. MCL 333.21513.

At Foote Hospital, as at most hospitals, the credentialing process for granting clinical privileges is established by the medical staff bylaws and related policies. The bylaws require that a physician seeking to become a member of the medical staff must complete and sign the application form and provide it to the medical staff coordinator,

[1] Dr. Rawal's affidavit was prepared in May 1998 in support of defendant's response to plaintiff's motion to compel production of credentialing documents. At that time, 35 of the physicians with staff privileges were osteopathic physicians (DOs), including 2 DO surgeons. As of the time of the motion for summary disposition in 2002, as set forth in Mr. Empey's affidavit, there were 30 DOs on the medical staff, including 3 DO surgeons. Currently DOs comprise 17.9% of the medical staff and 8.8% of the surgical staff. These figures clearly demonstrate that there is no discrimination against osteopathic physicians or osteopathic surgeons by Foote Hospital.

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who "shall, in a timely fashion, seek to collect or verify the references, licensure, and other qualification evidence submitted, and shall make inquiry to the national practitioner databank" (Medical Staff bylaws, Procedure for Appointment and Reappointment, pp 31-36, appx 5b-10b).

Qualifications for privileges are set forth in the bylaws. These include a license to practice in Michigan, known professional competence based on background, education, training, and references, moral integrity, ability to get along with other physicians and personnel, ability and willingness to contribute to educational programs and provide quality care. (Bylaws, article III, section 2, pp 7-9, appx 2b-4b.)

The bylaws do not require specialty board certification (i.e., certification that a physician has sufficient training and skill to be recognized or a specialist in a field of medicine). Rather, the bylaws provide that each department may establish guidelines for the granting of clinical privileges. (Bylaws, article XI, section 4(b), appx 12b.) The Surgery Department of Foote Hospital's medial staff to which plaintiff applied requires completion of an Accreditation Council for Graduate Medical Education (ACGME)--approved residency program and American Board of Surgery Specialty certification or eligibility. (Department of Surgery Rules and Regulations, section II(b), appx 14b.)

Plaintiff in his complaint alleged that he has been an osteopathic surgeon board certified by the American Osteopathic Association (AOA). He alleged that he graduated from an accredited osteopathic medical school, completed a one-year internship program, and a four-year general surgery residency program at Pontiac Osteopathic Hospital in Pontiac, Michigan (complaint, ¶¶ 6-7, appx 33a). Plaintiff during the course

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of the lawsuit below had staff privileges at Doctor's Hospital in Jackson, Michigan (complaint, ¶ 9, appx 33a).

In 1995, plaintiff applied for staff privileges at Foote Hospital (see 10/10/95 correspondence from Chairman of the Department of Surgery, Dr. Eddert, appx 53a-54a). On October 10, 1995, Dr. Fisher was advised by the Chairman of the Department of Surgery that they were concerned about whether his preceptorship in thoracic surgery met the current requirements of the Department of Surgery, as well as concerns about the quality of care in three cases in which plaintiff had performed thoracic surgery (10/10/95 correspondence, appx 53a-54a).

By correspondence of November 15, 1995, the Vice President for Legal Affairs for the hospital advised plaintiff that as a result of discussion by Foote Hospital leadership regarding staff privilege requirements, the Medical Executive Committee and Board of Trustees had adopted a waiver procedure whereby individual applicants can request waivers of certain qualification requirements. Plaintiff was further advised that his individual case would require waiver of the American Board of Surgery Requirement for membership in the Department of Surgery, and that it would be necessary for him to submit a written request that his Osteopathic Board certification/board eligibility be accepted in lieu of the American Board requirement (11/15/95 correspondence, appx 56a). The Medical Executive Committee Policy now allows for a waiver or exception to the threshold requirements (policy, appx 55a).

By correspondence of November 28, 1995, plaintiff did request a waiver of the requirement that he be certified by the American Board of Surgery (correspondence attached as Exhibit I to defendant's response, appx 57a).

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By correspondence of December 27, 1999, the President of Foote Hospital notified plaintiff that the waiver request was denied (12/27/99 correspondence, appx 58a). The President advised plaintiff that his "request for a waiver of the requirement of ACGME-approved training and American Board of Surgery certification" would be denied because:

> The reason for the denial was that based upon the information you had provided to date, the Board did not feel you had established that your training was reasonably equivalent to the ACGME-approved training. Questions were raised about the scope of your general surgery training experience, especially in light of the fact that 12 months of your training was spent in a thoracic surgery orientation. [12/27/03 correspondence, appx 58a.]

The hospital president went on, however, to provide plaintiff with the option of providing supplemental information to establish equivalency between his particular training program and that meeting the requirements of the ACGME:

> You do have the option of providing supplemental information in an attempt to establish training program equivalency, if you so desire. [12/27/95 correspondence, appx 58a.]

Rather than providing supplemental information to establish training program equivalency, however, plaintiff nearly two years later, on September 3, 1997, commenced this lawsuit.

At the time Dr. Fisher applied for privileges at Foote Hospital, 30 of the physicians with staff privileges were osteopathic physicians (affidavit of Harish Rawal, M.D., appx 18b). Further, two osteopathic surgeons who applied for staff privileges at about the same time as Dr. Fisher were granted staff privileges at the hospital (Id., ¶ 6).

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Trial Court Proceedings

On August 19, 2002, plaintiff served a motion for summary disposition as to liability pursuant to MCR 2.116(C)(10). Plaintiff asserted that there was no genuine issue of material fact and that plaintiff was entitled to judgment as a matter of law based on his inability to secure the granting of his 1995 application for staff privileges.

Defendant Foote Memorial Hospital filed a response to plaintiff's motion, submitting that summary disposition should be granted not to plaintiff but to the hospital pursuant to MCR 2.116(I)(2). The hospital submitted that plaintiff had failed to demonstrate that he was discriminated against on the basis of his osteopathic status where the record showed that the denial of privileges was for the reason that his training and subsequent experience did not meet the requisite criteria for receipt of privileges. The hospital further submitted that the hospital's staffing decision was not subject to judicial review. Finally, the hospital submitted that the hospital would be immune from liability pursuant to the peer review immunity statute, MCL 331.531, for its staffing decision here.

Following argument at a hearing held on September 13, 2002, Jackson County Circuit Court Judge Alexander Perlos issued an opinion and order granting summary disposition to the hospital. The court concluded, first, that plaintiff had failed to demonstrate that he was not given privileges because he was an osteopath:

> After a review of plaintiff's training and education, the defendant found that plaintiff was not qualified for privileges and requested further documentation from plaintiff so that he may be able to establish the threshold of training and experience required for the privilege(s). Plaintiff failed to respond.
>
> Plaintiff Fisher's claim that the denial was based upon the fact that he was a D.O. as opposed to an allopathic is without merit, as, defendant has shown that there are individuals with a D.O. certification which have staff

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privileges. [Opinion, p 2, appx 11a.]

The trial court went on to conclude that, alternatively, the hospital was entitled to statutory immunity for its staffing decision:

> Under MCL 333.21513(d), hospitals are responsible for staff selection and review of hospital staff in order to reduce morbidity and mortality, and to improve patient care within the hospital. Also, MCL 331.531 provides immunity to organizations like defendant, which conduct peer review of the qualifications of medical personnel to determine their qualifications for staff privileges. Unless it can be shown that defendant acted with malice in its decision, immunity should apply.
>
> The Court, after having heard the oral arguments, and having reviewed the motions and briefs filed by both parties, does not find that defendant was acting in an arbitrary or capricious manner nor did they act with malice. There are other individuals that are in a similar situation, with regards to certification, as plaintiff, that have been granted staff privileges. [Opinion, pp 2-3, appx 11a-12a.]

Finally, noting that the hospital was in a better position than the court to evaluate the training and experience of plaintiff for staff privileges, the trial court concluded that "the decision of the defendant's review board in this case [is not] subject to judicial review . . . ." (Opinion, p 3, appx 12a.)

Court Of Appeals' Decision

Plaintiff appealed to the Court of Appeals, challenging all of the alternative grounds upon which the trial court had granted summary disposition. In a per curiam decision issued on May 4, 2004, the Court of Appeals held that plaintiff's only claim, for violation of MCL 333.20165(1)(b) of the Public Health Code, was precluded because the Code does not expressly create a private cause of action, but does create adequate means of enforcing its provisions (appx15a-17a). The Court of Appeals did not reach the other alternative grounds upon which the trial court had granted summary disposition.

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This brief is now submitted by W.A. Foote Memorial Hospital, Inc., in support of the judgments of the lower courts.

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SUMMARY OF ARGUMENT

The Court of Appeals correctly concluded that the Public Health Code provision prohibiting discrimination on the basis of licensure, registration or education as a doctor of osteopathic medicine, MCL 333.21513(e), does not create a right to judicial review of, or tort recovery for a violation of the statute. Where, as here, the Legislature has set forth express and comprehensive administrative and injunctive remedies, the general rule of statutory construction--that the remedies provided by statute for violation of a right having no common-law counterpart are exclusive—applies.

The exception to that rule recognized for civil rights statutes intended to benefit individuals rather that the public should not be applied here. This is because the express purpose of the Public Health Code is to protect the public, and right at issue is not a fundamental personal civil right.

Finally, with the enactment of the Civil Rights Act providing for tort and administrative remedies for selected civil rights violations, the exception to the rule created for civil rights actions is no longer necessary or valid. The judiciary should not presume to engraft on legislation a remedy the Legislature declined to create.

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STANDARD OF REVIEW

A trial court's grant of summary disposition is reviewed is de novo. Wickens v Oakwood Healthcare System, 465 Mich 53, 59; 631 NW2d 686 (2001). Questions of statutory interpretation are questions of law which are likewise reviewed de novo. Veenstra v Washtenaw Country Club, 466 Mich 155; 645 NW2d 643 (2002).

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ARGUMENT

THE PUBLIC HEALTH CODE PROVISION PROHIBITING DISCRIMINATION ON THE BASIS OF LICENSURE, REGISTRATION OR EDUCATION AS A DOCTOR OF OSTEOPATHIC MEDICINE, MCL 333.21513(E), DOES NOT CREATE A RIGHT TO JUDICIAL REVIEW OF, OR TORT RECOVERY FOR A VIOLATION OF THE STATUTE, AND THE JUDICIARY SHOULD NOT ENGRAFT SUCH A REMEDY ON THE STATUTE.

Even assuming arguendo that plaintiff could establish a violation of the nondiscrimination provision of MCL 333.21513(e) (which defendant denies for the many reasons found by the trial court), Foote Hospital submits that the Court of Appeals correctly held that the statute such does not give rise to a private civil cause of action in tort by a physician so as to subject a hospital's credentialing decision to judicial review. MCL 333.21513(e) provides no right to bring a private civil tort action based upon violation of the statute, where the Public Health Code does provide various avenues of administrative and injunctive relief for a statutory violation.

A. Pertinent Public Health Code Legislative Intent, Anti-Discrimination and Enforcement Provisions.

The Public Health Code, MCL 333.1011-MCL 333.25211, was enacted in 1978, 1978 PA 368. (Relevant statutes are reproduced in the appendix, pp 25b-33b.) It includes in Article 1 an express legislative directive regarding its purpose to aid in judicial construction of its provisions in MCL 333.1111(2):

> This code shall be liberally construed for the protection of the health, safety, and welfare of the people of this state.

The provision at issue in this appeal, MCL 333.21513(e), is in Article 17 of the Public Health Code, MCL 333.20101-MCL 333.22260, which pertains to health facilities and agencies. Again the Legislature has provided guidance regarding construction in section 20101 which provides, in part:

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In addition, article 1 contains general definitions and principles of construction applicable to all articles in this code. [MCL 333.20101(2)]

Section 21513 as originally enacted in 1978 set forth various responsibilities of owners and operators of hospitals, including review of professional practices to reduce morbidity and mortality. The statute was amended in 1989 to add subsection 21513(e).

Subsection 21513(e) outlines obligations by a hospital to act in a nondiscriminatory manner in several specific aspects of the operation of a hospital and selection of medical staff--in "employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs." MCL 333.21513(e) provides that the owners and operators of a hospital:

> (e) [After December 31, 1989][2] [s]hall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training program on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry. [Emphasis added.]

The Legislature in Article 17 of the Public Health Code has established a comprehensive set of specific remedies for violation of the Article, ranging from limiting a license, to injunctive relief, to criminal penalties. These include MCL 333.20165(1)(b), MCL 333.20176, MCL 333.20177, MCL 333.20199.

MCL 333.20165(1)(b) provides for the limitation, suspension, or revocation of a health facility license, as well as an administrative fine on a hospital that violates a provision contained in Article 17:

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[2] This language, not relevant to the appeal, was omitted by amendment by 2002 PA 125.

(1) Except as otherwise provided in this section, after notice of intent to an applicant or licensee to deny, limit, suspend, or revoke the applicant's or licensee's license or certification and an opportunity for a hearing, the department may deny, limit, suspend, or revoke the license or certification or impose an administrative fine on a licensee if 1 or more of the following exist:* * *

(b) A violation of this article or a rule promulgated under this article.

MCL 333.20176 provides a remedy to private persons, in requiring the department to investigate a health facility upon written complaint of a person who believes that the facility violated the code:

> A person may notify the department of a violation of this article [Article 17] or of a rule promulgated under this article that the person believes exists. The department shall investigate each written complaint received and shall notify the complainant in writing of the results of a review or investigation of the complaint and any action proposed to be taken. Except as otherwise provided in sections 20180, 21743(1)(d), and 21799a, the name of the complainant and the charges contained in the complaint are a matter of public record.

MCL 333.20177 allows the director of the department to request that a prosecuting attorney or attorney general bring an action to restrain or enjoin actions in violation of Article 17:

> Notwithstanding the existence and pursuit of any other remedy, the director, without posting a bond, may request the prosecuting attorney or attorney general to bring an action in the name of the people of this state to restrain, enjoin, or prevent the establishment, maintenance, or operation of a health facility or agency in violation of this article or rules promulgated under this article.

MCL 333.20199 makes violation of a provision of Article 17 a misdemeanor punishable by a $1,000 fine for each occurrence or day that the violation continues:

(1) Except as provided in subsection (2) or section 20142, a person who violates this article or a rule promulgated or an order issued under this article is guilty of a misdemeanor, punishable by fine of not more than $1,000.00 for each day the violation continues or, in case of a violation

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of sections 20551 to 20554, a fine of not more than $1,000.00 for each occurrence.

However, no provision of the Public Health Code provides for a private civil tort remedy for damages for violations of the non-discrimination provisions of MCL 333.21513(e).

The Michigan Civil Rights Act in MCL 37.2206 and MCL 37.2801 provides for a private cause of action against an employer for specified types of discrimination--"based on religion, race, color, national origin, age, sex, height, weight, or marital status", some of which are also protected by MCL 333.21513(e). The Act, however, does not provide for a private cause of action for discrimination on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

B. The "General Rule" Of Statutory Construction Is That The Remedies Provided By Statute For Violation Of A Statutorily Created Right Having No Common-Law Counterpart Are Exclusive.

As a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive. Pompey v General Motors Corp, 385 Mich 537, 554-557; 189 NW2d 243 (1971), International Brotherhood Electrical Workers v McNulty, 214 Mich App 437; 543 NW2d 25 (1995). The rule was first stated by this Court in Thurston v Prentiss, 1 Mich 193, 200 (1849):

> It is a well established principle of law, that where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued; and a party seeking the remedy is confined to that remedy, and that only.

The Court in Pompey v General Motors Corp more recently recognized and re-embraced as correct the "general rule, in which Michigan is aligned majority of

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jurisdictions, . . . that where a new right is created or a new duty imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and non-performance is exclusive." Pompey v General Motors Corp, 385 Mich 537, 554; 189 NW2d 243 (1971).

The Court's most recent pronouncement and application of this rule was in Monroe Beverage Company, Inc v Stroh Brewery Company, 454 Mich 41; 559 NW2d 297 (1997), in which the Court held that the Liquor Control Act, which set forth new rights and responsibilities, did not give rise to a civil cause of action other than that expressly provided by the statute:

> It is well established that "[w]here a statute gives new rights and prescribes new remedies, such remedies must be strictly pursued; and a party seeking a remedy under the act is confined to the remedy conferred thereby and to that only."

The Court of Appeals has properly applied this fundamental principle to hold that a disgruntled physician may not bring a cause of action for perceived statutory violations under the Michigan Public Health Code both here and in other cases, see Ravikant v William Beaumont Hospital, unpublished opinion per curiam of the Court of Appeals, docket no 238911, rel'd 9/30/03, or the Michigan peer review statute, MCL 331.531, Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996).

For the reasons set forth below, the Court of Appeals properly applied the rule to hold that the Public Health Code remedies for violation of the new, statutory prohibition on discrimination against osteopathic physicians are exclusive.

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C. The Exception To This "General Rule" First Created In Bolden v Grand Rapids Operating Corp, 239 Mich 318; 214 NW 241 (1927), Was Based On Principles Of Statutory Construction, And Was Narrow And Exclusive In Application To Violation Of Statutes Protecting Personal And Fundamental Civil Rights.

The exception to general rule that the remedies provided by statute for violation of a statutorily created right are exclusive upon which plaintiff here relies should not be applied to MCL 333.21513(e). The exception was first recognized and applied by the Court in Bolden v Operating Corp, 239 Mich 318; 214 NW 241 (1927), to hold that a private cause of action for damages would lie for a civil rights violation--race discrimination in a public accommodation in violation of a criminal statute. The Court again applied this exception in St John v General Motors Corp, 308 Mich 333; 13 NW2d 840 (1944), to hold that violation of a criminal statute prohibiting sex discrimination in payment of wages--violation of a "personal civil right"--gave rise to a private cause of action to recover wages.

The Court In Pompey v General Motors Corp, 385 Mich 537, 554-557; 189 NW2d 243 (1971), relied on Bolden and St John to hold that a private plaintiff could maintain a civil damage action for redress of his statutorily created right to be free from discrimination in private employment under the former civil rights act, the Fair Employment Practices Act, FEPA, in addition to the remedial machinery provided by the statute.

The exception to the general rule applied in Pompey, was that recognized in Michigan "and some other jurisdictions," where "the statutory rights infringed were civil rights." Pompey, supra, 553, emphasis added. The exception was purportedly based

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on principles of statutory construction, but narrow and exclusive in its application to violation of statutes protecting personal and fundamental civil rights

The basis for the Court's recognition of such an exception was twofold. The first was the historical importance of civil rights in Michigan. The second was the principle of statutory construction allowing the judiciary to imply legislative intent to create a private cause of action where a statute was intended to benefit particular persons, rather than the public at large. The Court in Pompey explained:

> Our Court unqualifiedly rejected such an argument [that statutory remedies are exclusive] when dealing with civil rights statutes, concluding that the aggrieved person may maintain an action for damages for injuries suffered by the violation of the civil rights statute despite the fact that the statute made no express provision for such recovery. We cited as the controlling principle:
>
> "'In cases where there has been illegal discrimination the person aggrieved has clearly a civil right of action for damages, and this is true although the provision for the enforcement of a civil rights statute under which the complainant claims redress provides for a criminal prosecution only. This right accrues by virtue of the general rule that where a statute imposes upon any person a specific duty for the protection or benefit of others, neglect or refusal to perform the duty creates a liability for any injury or detriment caused by such neglect or refusal, if the injury or hurt is of the kind which the statute was intended to prevent.'"

In Bolden, the Court reasoned that recognition of a private action for civil rights violations was governed by the principle of statutory construction that turns on

> "'whether it appear that the duty imposed [by the particular statute] is merely for the benefit of the public, and that the fine or penalty a means of enforcing his duty and punishing a breach thereof, or whether the duty imposed is also for the benefit of the particular individuals or classes of individuals.'" Bolden, supra, 327, quoting 1 C J, p 957.

Since Pompey, this Court has applied this exception only once, in another civil rights action for age discrimination, in Holmes v Haughton Elevator Co, 404 Mich 36; 272 NW2d 550 (1978).

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The Court in Lamphere Schools v Lamphere Federation of Teachers, 400 Mich 104; 252 NW2d 818 (1977), emphasized that that Pompey is limited to the context of violation of "fundamental or civil rights":

> We note in passing, that for purposes of discussion here, we accept Pompey for the general proposition cited, that case is easily distinguished from the case at bar. Pompey, dealt with the exclusive-cumulative dichotomy regarding statutory remedies in the context of fundamental or civil rights. The instant case involves damages arising out of the alleged violation of propriety rights. Pompey, supra, 553. [Lamphere Schools, supra, 126 n 9, emphasis added by the Court.]

In Lamphere, the Court refused to allow teachers to be held liable in tort by a school district for damages incurred as a result of a strike prohibited by the Public Employment Relations Act.

D. The General Rule Should Be Applied, And A Private Cause Of Action For Damages Should Not Be Judicially Engrafted On MCL 333.21513(E), Where The Legislature Has Enacted Comprehensive Remedies For Its Violation And Has Declared That Its Intent Is To Protect The Public, And The Purported Violation Does Not Involve A Fundamental Civil Right.

Assuming this principle of statutory construction and the manner of its application in Bolden and Pompey remain valid, this still would not permit judicial implication from MCL 333.21513(e) of a private right of action for damages by an individual osteopathic physician. First, unlike the civil rights statutes at issue in Pompey, Bolden and St John, the Public Health Code has as its express stated purpose the protection and benefit of the public, and not the rights of individual physicians:

> This code shall be liberally construed for the protection of the health, safety, and welfare of the people of this state. [MCL 333.1111(2)].

Within the context of the express language of the Legislature in the Public Health Code, then, the purpose of the Act is to benefit the public. This purpose in the context of the anti-discrimination clause of MCL 333.21315 would be, for example, to ensure

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that patients are offered the widest array of services possible, by ensuring that osteopathic physicians are included on hospital staff and available to patients who would choose the services of osteopathic physicians.

Given that the stated purpose of this legislation is to protect and for the benefit the public, the basic premise for application of principles of statutory construction upon which Bolden and its progeny were based does not exist here. The Courts should not disregard this express intent to imply an intent to benefit individual hospital staff or physicians.

Where the Legislature has thus spoken, the judiciary may not imply a different purpose to financially benefit private individuals under the guise of statutory construction. As observed by the Court in Boscaglia v Michigan Bell Telephone Co, 420 Mich 308, 314, 318; 362 NW2d 642 (1985), in "read[ing] Pompey as" being premised on statutory construction, and a divination of what the Legislature intended by the civil rights statute at issue there (FEPA):

> "[T]he question whether a statute creates a private right of action is ultimately 'one of [legislative] intent, not one of whether this Court thinks that it can improve upon the statutory scheme that [the Legislature] enacted into law * * *.'"

Given the express stated purpose of the Public Health Code and the Legislature's comprehensive scheme of remedies for enforcement of Article 17, it would be presumptuous of a Court to usurp the role of the Legislature and embellish upon those remedies by creating a private cause of action for damages. As detailed above, and summarized by the Court of Appeals in this matter:

> Here, a number of ways exist within the code to enforce the rule. MCL 333.20165(1)(b) provides for the limitation, suspension, or revocation of a health facility license, as well as an administrative fine on a hospital that

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> violates a provision contained in the code. Further, MCL 333.20176 requires the department of health to investigate a health facility upon written complaint of a person who believes that the facility violated the code. Also, MCL 333.20177 allows the director of the department of health to request that a prosecuting attorney or attorney general bring an action to restrain or enjoin actions in violation of the code. Finally, MCL 333.20199 makes violation of a provision of the code a misdemeanor punishable by a $1,000 fine for each occurrence or day that the violations continues. Clearly, the code has adequate means of enforcing the provisions of MCL 333.21513(e).

In Lane v Kindercare Learning Centers, Inc, 231 Mich App 689; 588 NW2d 715 (1998), the Court refused to permit a private right of action under the child care organizations act for injuries allegedly sustained in connection with day care provided by the defendant, because analogous enforcement provisions and remedies were set forth in that act. The Court reasoned:

> Here, the act does not expressly create a private cause of action. Furthermore, the act adequately provides for enforcement of its provisions through proceedings instituted by the Attorney General. MCL 722.123; MSA 25.358(23). The act also provides criminal penalties for the violation of its provisions. MCL 722.125; MSA 25.358(25). Therefore the trial court properly concluded that plaintiff had no private cause of action based on the alleged violations of the child care organizations act.

Here, as well, there can be no private right of action implied from section 23513(e), where there are various specific remedies provided by Article 17 of the Public Health Code.

Moreover, the right upon which Dr. Fisher seeks to assert a private cause of action for damages is not a fundamental or civil right to which the Court had limited the exception to the general rule. Lamphere Schools v Lamphere Federation of Teachers, 400 Mich 104; 252 NW2d 818 (1977). Here, in contrast to Bolden, Pompey and Holmes, the issue does not involve a fundamental or civil right. Surely one's choice of medical school or trade school or graduate training program (allopathic versus

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osteopathic) cannot rise to the level of a fundamental or civil right--to be free from discrimination based on fundamental or constitutionally protected personal attributes of race, sex, religion, age, etc.

Indeed, the legislative history which the amicus curiae American Osteopathic Association and Michigan Osteopathic Association appended to their initial brief in the Court of Appeals reflects that the Legislature viewed the newly created right of osteopathic physicians to be considered for medical staff to be independent and distinct from the "civil rights" also addressed by MCL 333.21513. The following comment in the SFA Bill Analysis (reproduced at Appx 1b), specifically distinguishes between professional education, and "basic civil rights":

> [T]he bill would ensure that properly licensed physicians could not be denied hospital privileges solely on the grounds of their licensure or professional education, as well as generally protect basic civil rights.

Bolden created an exception for violation of basic civil rights otherwise protected under the Constitution or Michigan's civil rights laws. Bolden, and its exception, does not justify judicial creation of a private cause of action for damages for other statutory rights. One's choice of the type of medical school education or training clearly is not so important or fundamental a right, nor a "civil right," as would justify judicial exception which would have to be made, to allow plaintiff's action here, to the general rule acknowledged in Pompey precluding a civil action for damages based on a statutory right where the Legislature has created specific remedies.

There is also judicial policy in Michigan that weighs against recognition of common law tort remedies in the context of medical staff privileges. Michigan appellate courts have long decided as a matter of common law that they will not interfere with staffing decisions at private hospitals, and that these hospitals have the power to

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appoint and remove staff members without judicial supervision. Hoffman v Garden City Hospital, 115 Mich App 773; 432 NW2d 820 (1982), Long v Chelsea Community Hospital, 219 Mich App 578; 557 NW2d 157 (1996), Sarin v Samaritan Health Center, 176 Mich App 790, 793; 440 NW2d 80 (1989).

In first endorsing this approach, the Court in Hoffman relied on Shulman v Washington Hospital Center, 222 F Supp 59 (DDC 1963) remanded with instructions, 348 F2d 70 (1965), aff'd on remand, 319 F Supp 252 (DDC 1970), in which the Court held that courts should refrain from reviewing staffing decisions of private hospitals, the rationale primarily being that courts are ill-equipped to decide such issues:

> There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these the courts are not in a position to substitute their judgment for that of professional groups. [Shulman, supra at 64 .]

Within the context of the Public Health Code this is particularly apt, where the Legislature has also provided that professional review of medical staff is confidential and neither discoverable nor admissible. MCL 333.21515, MCL 333.20175(8), Dye v St

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John Hospital and Medical Center, 230 Mich App 661; 584 NW2d 747 (1998). While a panel of the Court of Appeals recently limited this doctrine, Feyz v Mercy Memorial, __Mich App___ ; ___NW2d___ (2005), application for leave pending, the Court did leave the doctrine intact where, as here, there is an attempt to place on hospitals obligations greater than those placed on other corporations.

Reliance by the amicus curiae on the 1976 New York decision of Fritz v Huntington Hospital, 39 NY2d 339; 348 NE2d 547 (NY Ct App 1976), is misplaced. There, a statutory administrative body, the "Public Health Council", found that it was a violation of that state's Public Health Law for a hospital to demand an American Medical Association-approved internship program of doctors of osteopathy. By statute, the hospital's decision was subject to judicial review for purposes of determining whether injunctive relief would be appropriate. The issue decided by the New York court was by whom the statutory action for injunctive relief could be brought, private individuals or the state--a question of standing.

Here, in contrast, Dr. Fisher is not seeking to pursue any remedy provided to anyone by the Public Health Code. Dr. Fisher's complaint specifically seeks only money damages (with a vague further reference to unidentified "further relief as shall be agreeable to equity and good conscience.") (Complaint, appx 36a). Dr. Fisher is asking this Court to imply a civil action for monetary damages for the alleged economic loss sustained by Dr. Fisher as an alleged consequence of his failure to obtain privileges at W.A. Foote Memorial Hospital.

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The standing issue addressed by the court in Fritz was whether, where the statute explicitly provided for the civil remedy of injunctive relief, the medical students

had standing to pursue an injunction, or whether that remedy was solely that of the Public Health Council or the State Commissioner of Health. In contrast to the New York statutory scheme, Michigan's Public Health Code affords an injunctive remedy specifically only to the department through request to the Attorney General, MCL 333.20177. The Public Health Code leaves no room to imply a right to pursue a civil action for damages or injunctive relief by a private person.

E. Where The Legislature Has Enacted A Comprehensive Scheme To Protect Certain Civil Rights In Certain Specific Contexts Through Specific Administrative And Tort Remedies, The Exception For Civil Rights Upon Which Bolden And Progeny Were Premised Is No Longer Valid; The Court Should Hold That Legislative Remedies For Violations Of Legislative Rights Are Exclusive Without Regard To Whether They Would Be Considered By The Judiciary To Be Adequate.

Where the Legislature has enacted a comprehensive scheme to protect certain civil rights in certain specific contexts and provided for administrative and tort remedies, the exception for civil rights upon which Bolden and progeny were premised is no longer valid. In Mack v City of Detroit (On Remand), 254 Mich App 498; 620 NW2d 670 (2002), the Court concluded that Pompey itself (which was decided under the Fair Labor Standards Act) has effectively been superceded by the Civil Rights Act, MCL 37.2801. Because the Civil Rights Act does provide for a civil remedy under specified procedures for discrimination based on specified characteristics, the Court in Mack, supra, 502, held it to be the exclusive remedy for such claims.

> In contrast, the remedies provided under the current Civil Rights Act are fully adequate. The act establishes the right to file a civil cause of action to recover damages and obtain injunctive relief, in addition to the right to initiate administrative proceedings before the Civil Rights Commission. MCL 37.2801(1). Therefore, the justification for allowing cumulative remedies for civil rights violations found in Pompey no longer exists, and the general rule with regard to the exclusivity of statutory remedies

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> applies. This conclusion is supported by the fact that the current Civil Rights Act "limits complaints to causes of action for violations of the act itself." Mack , supra, 467 Mich 196. [Mack v City of Detroit (On Remand), 254 Mich App 498, 502.]

Likewise, defendant submits that the exclusive remedy for discrimination in employment or accommodations in violation of MCL 333.21513(e) would be that provided for, if at all, under the Civil Rights Act. The Legislature has set also forth a separate, detailed and specific framework for judicial review of and tort remedies for selected types of discrimination against selected categories of individuals. Civil actions for money damages for, and injunctive relief from, certain specific types of discrimination, are provided for in the Michigan Civil Rights Act, MCL 37.2801, 37.2803, and the Michigan Persons With Disabilities Act, MCL 37.1101 et seq.

These statutes provide for private causes of action for most of the types of fundamental civil rights discrimination by health facilities prohibited by the Public Health Code in MCL 333.21513(e)--"race, religion, color, national origin, age, or sex." No similar private right of action for damages has been established by the Legislature, however, for discrimination on the basis of licensure, education, or board certification as an osteopath or allopath. No private right of action should be implied.

It is also significant that even if Dr. Fisher were complaining of a violation of a fundamental civil right by defendant, he still might not be entitled to relief under the Civil Rights Acts. As an independent staff physician, there would be no employment relationship, see Grewe v Mt Clemens General Hospital, 404 Mich 248; 273 NW2d 429 (1978); Dr. Fisher thus would not have standing as a plaintiff to sue under the Civil Rights Act. See Ravikant v William Beaumont Hospital, unpublished opinion per curiam of the Court of Appeals, docket no 238911, rel'd 9/30/03)(physician claiming racial

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discrimination by hospital in restricting his staff privileges did not have standing to bring an action under the Civil Rights Act in the absence of an employment relationship).

The Court should reject the exception to the statutory construction rule first fashioned in Bolden, and leave the legislating of remedies for statutory violations to the Legislature. Courts should no longer intrude upon the province of the Legislature to engraft upon a legislative scheme of remedies a judicial remedy under the guise of statutory construction.

Accordingly, the Court of Appeals correctly held that a private right of action for tort damages cannot be judicially implied for violation of MCL 333.21513(e).

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RELIEF REQUESTED

WHEREFORE defendant W.A. Foote Memorial Hospital respectfully requests that this Honorable Court affirm the judgments of the trial court and Court of Appeals.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE SUPREME COURT

DR. LOWELL FISHER, an Individual,

Plaintiff-Appellant,

vs.

W.A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellee.

_____/

Supreme Court
No. 126333

Court of Appeals
No: 244678

Jackson County Circuit Court
No: 97-79018-CZ

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

Lynn Lasher, being first duly sworn, deposed and says that she is employed with the firm of KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI and that on the 12TH day of APRIL, 2005 personally served upon:

Philip Green, Esq. (P14316)
Attorney for plaintiff
900 Victors Way
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Ann Arbor, MI 48108
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and the following documents: **BRIEF FOR DEFENDANT-APPELLEE W.A. FOOTE MEMORIAL HOSPITAL, APPENDIX AND AFFIDAVIT OF SERVICE** by having same enclosed in an envelope with postage thereon fully and deposited in a United States postal receptacle.

Further Affiant saith not.

Lynn Lasher

Subscribed and sworn to before me on the 12TH day of APRIL 2005

NOTARY PUBLIC

HEATHER OPDYKE
Notary Public, Wayne County, MI
My Commission Expires May 4, 2007

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